# CERTIFICATE

## Supreme Court of the United States

**OCTOBER TERM, 1931**

## No. 387

RUTH J. HENKEL, AS ADMINISTRATRIX AND PERSONAL REPRESENTATIVE OF THE ESTATE OF CARL E. P. HENKEL, DECEASED,

*vs.*

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**FILED SEPTEMBER 17, 1931**

**(36,201)**

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 28, 1931

[fol. 1]

# IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, MAY TERM, A. D., 1931

No. 9090

RUTH J. HENKEL as Administratrix and Personal Representative of the Estate of Carl E. P. Henkel, Deceased, Appellant,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellee

Appeal from the District Court of the United States for the District of Minnesota

**Certificate of Question**—Filed Aug. 28, 1931

Mr. Robert J. McDonald, Mr. William A. Tautges, and Mr. Bertram W. Wilder submitted brief for appellant.

Mr. Alfred E. Rietz, Mr. William T. Faricy, and Mr. Warren Newcome submitted brief for appellee.

Before Kenyon and Booth, Circuit Judges, and Dewey, District Judge

## STATEMENT OF CASE

The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that a record on an appeal now pending before it discloses the following: Ruth J. Henkel, as Administratrix and Personal Representative of the Estate of Carl E. P. Henkel, Deceased, brought an action at law against Chicago, St. Paul, Minneapolis & Omaha Railway Company, a corporation of the State of Wisconsin, in the United States District Court for the District of Minnesota, to recover damages on account of the death of said Carl E. P. Henkel, her husband, who was a brakeman in the employ of the Defendant Company on one of its freight trains which was wrecked by reason of a washout. Plaintiff at the time of bringing suit was a resident [fol. 2] of Nebraska. At the time of the accident, plaintiff

and her husband were residents of Iowa. The action was brought under the provisions of the Federal Employers' Liability Act, the complaint alleging that the deceased at the time of his death and the Railroad Company were both engaged in interstate commerce. Various items of negligence were alleged, including failure to use due care in the maintenance of the track and roadbed in a reasonably safe condition.

The case was tried and resulted in a verdict and judgment for the plaintiff. Application was made by plaintiff to the court for an order allowing fees, in sums named, for two expert witnesses, civil and hydraulic engineers, who had testified at the trial, and directing that such sums be taxed against the defendant, and directing the Clerk of the Court to include such amounts in a judgment in plaintiff's favor. The subject of the testimony of the two witnesses was a proper one for expert testimony, and the witnesses were qualified as experts. Defendant objected to the allowance of expert witness fees upon the ground that there was no authority of law for the taxation of expert witness fees in said court, and that the same could not be legally taxed against the defendant.

In its order denying the plaintiff's motion, the trial court said:

"Upon application of the plaintiff, the court has further considered this matter and as a part of this court's order denying plaintiff's motion, finds that under the practice prevailing within the State of Minnesota in the state courts, plaintiff would be entitled to an allowance of Twenty-five ($25.00) Dollars per day for the twenty-one days the two experts actually spent in court in attendance upon the trial, which would be in the sum of Five hundred twenty-five ($525.00) Dollars, and that such sum of Five hundred twenty-five ($525.00) Dollars should be added to the judgment in the case at bar, except for the fact that I am of the opinion that I am without power and authority to allow plaintiff expert fees in view of the Federal statute; but if the state practice could be allowed in the Federal [fol. 3] court, or if I had the power and authority to allow plaintiff expert fees, I would allow plaintiff the sum of Five hundred twenty-five ($525.00) Dollars as expert fees to be added to the judgment in this cause * * *."

From the order denying the allowance of expert witness fees, a cross appeal was taken to this court by plaintiff, defendant having already appealed from the judgment entered upon the verdict.

Section 7009 of Mason's Minnesota Statutes for 1927, Volume II, provides:

"Expert Witnesses.—The judge of any court of record, before whom any witness is summoned or sworn and examined as an expert in any profession or calling, may, in his discretion, allow such fees or compensation as in his judgment may be just and reasonable."

In the state courts of Minnesota it has been the usage and practice for many years under this statute to allow reasonable expert fees, which are added to the taxable costs and become part of the judgment. The amount named in the order of the trial court is not in excess of the amount usually allowed in the state courts of Minnesota.

No such usage or practice exists in the federal court in Minnesota, but the practice in regard to the matter is not uniform in the federal courts throughout the circuit.

The contention of the appellant is:

"The Court below possessed the power, authority and discretion to follow the prevailing state practice within the State of Minnesota, which is to the effect that expert fees are allowable in the discretion of the trial court, and as the allowance of expert fees is not prohibited by either the Federal statutes or Court rule, the Court possessed the inherent power to allow the same."

The contention of appellee is that "Congress has provided for the payment and taxation of witness fees and therefore the State statute or rule does not obtain in Federal Court."

This court, being in doubt, desires the instruction of the Supreme Court upon the following question, a decision of which is deemed indispensable to a determination of the [fol. 4] appeal No. 9090 now pending before it, and to a proper discharge of its duties therein:

QUESTION CERTIFIED

Question: Has a United States District Court power and authority to allow expert witness fees, and to include the

same as part of the taxable costs in a law case, said United States District Court being for and sitting in a State the Courts of which are by a state statute authorized, in their discretion, to allow expert witness fees, and the practice and usage in said state courts being to make such allowances and to include the same in the taxable costs, but there being no such usage and practice in said United States District Court?

William S. Kenyon, United States Circuit Judge.
Wilbur —. Booth, United States Circuit Judge.
Charles A. Dewey, United States District Judge.

[File endorsement omitted.]

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[fol. 5] In United States Circuit Court of Appeals, Eighth Circuit

Clerk's Certificate

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing Certificate in the case of Ruth J. Henkel, as Administratrix and Personal Representative of the Estate of Carl E. P. Henkel, Deceased, Appellant, vs. Chicago, St. Paul, Minneapolis & Omaha Railway Company, No. 9090, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said Certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In Testimony Whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 1st day of September, A. D. 1931.

E. E. Koch, Clerk of the United States Circuit Court of Appeals, Eighth Circuit. (Seal United States Circuit Court of Appeals, Eighth Circuit.)

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Endorsed on cover: Certificate. File No. 36,201. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 387. Ruth J. Henkel, as administratrix and personal representative of the estate of Carl E. P. Henkel, deceased, vs. Chicago, St. Paul, Minneapolis & Omaha Railway Company. Certificate. Filed September 17, 1931. File No. 36,201.